LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
MAR 17 1958
JOHN T. FEY, Clerk

No. 792

In the Supreme Court of the United States

OCTOBER TERM, 1957

YVETTE J. MADSEN, PETITIONER

v.

WINFRED OVERHOLSER, SUPERINTENDENT OF SAINT ELIZABETH'S HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
W. WILSON WHITE,
Assistant Attorney General,
HAROLD H. GREENE,
Attorney,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provisions and statutes involved	2
Statement	4
Argument	6
Conclusion	12

CITATIONS

Cases:	
Madsen v. *Kinsella*, 93 F. Supp. 319, affirmed, 188 F. 2d 272, affirmed, 343 U. S. 341	5, 7, 8, 9, 10, 11
Reid v. *Covert*, 354 U. S. 1	5, 6, 7, 8, 10, 11
United States ex rel. Krueger v. *Kinsella*, 137 F. Supp. 806, reversed, 354 U. S. 1	7, 8
Constitution, Statutes and Articles of War:	
Article I, Sec. 8	2
Article II, Sec. 2	2
Article III, Sec. 2	2, 10
Fifth Amendment	2, 10
Sixth Amendment	2, 10
65 Stat. 451	11
Articles of War, amended by Act of June 4, 1920, c. 227 subch. II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627:	
Art. 2 [10 U. S. C. (1946 ed.) 1473]	3
Art. 12 [10 U. S. C. (1946 ed.), Supp. IV, 1483]	3
Art. 15 [10 U. S. C. (1946 ed.) 1486]	3
Art. 38 [10 U. S. C. (1946 ed.), Supp. IV, 1509]	4
Miscellaneous:	
Proclamation, 66 Stat. C3	11
Proclamation, 66 Stat. C31–32	7
Winthrop, *Military Law and Precedents* (2d ed. 1920) 801	10

458072—58

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 792

YVETTE J. MADSEN, PETITIONER

v.

WINFRED OVERHOLSER, SUPERINTENDENT OF SAINT ELIZABETH'S HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is not yet reported. The memorandum opinion of the District Court is not yet reported (R. 34).

JURISDICTION

The judgment of the Court of Appeals was entered January 16, 1958. The petition for a writ of certiorari was filed on February 18, 1958. On the same day, petitioner filed a Motion for Leave to File and Petition for Reconsideration in No. 411, *Yvette J. Madsen* v. *Nina Kinsella,* October Term, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether United States military courts have jurisdiction, in an area conquered and governed by American military forces, to try the civilian wife of a United States serviceman for murdering her husband.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States—

> Article I, Sec. 8: The Congress shall have Power * * * To declare War * * * To raise and Support Armies * * * To make Rules for the Government and Regulation of the land and Naval Forces * * *.
>
> Article II, Sec. 2: The President shall be Commander in Chief of the Army and Navy of the United States * * *.
>
> Article III, Sec. 2, clause 3: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.
>
> Amendment, Article V—No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; * * *.
>
> Amendment, Article VI—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227 subch. II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

> Art. 2 [10 U. S. C. (1946 ed.) 1437]. Persons subject to military law.
>
> The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these articles: * * *.
>
> * * * * *
>
> (d) All retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;
>
> * * * * *
>
> Art. 12 [10 U. S. C. (1946 ed.), Supp. IV, 1483]. General courts martial.
>
> General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals * * *.
>
> Art. 15 [10 U. S. C. (1946 ed.) 1486]. Jurisdiction not exclusive.
>
> The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions,

provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Art. 38 [10 U. S. C. (1946 ed.), Supp. IV, 1509]. President may prescribe rules.

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further,* That all rules and regulations made in pursuance of this Article shall be laid before the Congress.

STATEMENT

Petitioner, the civilian wife of an American serviceman in Germany, was charged in October, 1949, with murdering her husband, in violation of a provision of the German Criminal Code. She was tried by the "United States Court of the Allied High Commission for Germany, 4th Judicial District," found guilty, and sentenced to imprisonment for a term of fifteen years (R. 1). While serving this sentence in the Federal Reformatory for Women at Alderson, West Virginia, she petitioned for a writ

of habeas corpus. The petition was dismissed, *Madsen* v. *Kinsella,* 93 F. Supp. 319 (S. D. W. Va.) and the dismissal was sustained by the Court of Appeals (188 F. 2d 272 (C. A. 4)), and by this Court (343 U. S. 341).

Thereafter, petitioner became a patient and United States prisoner at Saint Elizabeth's Hospital in the District of Columbia, and on August 9, 1957, she again petitioned for a writ of habeas corpus. In this new petition she alleged that, at all times relevant to the case, a state of peace existed between the United States and Germany, and that military government and the occupation of Germany, as such, had ceased to exist. She further stated that in view of these circumstances, and on the basis of the recent decision of this Court in *Reid* v. *Covert,* 354 U. S. 1, she was entitled to immediate release,[1] inasmuch as her continued confinement constituted a violation of her constitutional rights (R. 2–4).

In his Return and Answer to the Rule to Show Cause, respondent quoted from opinions of the District Court and of this Court in the earlier habeas corpus proceeding involving petitioner, to the following effect: On September 21, 1949, a so-called Occupation Statute took effect in Western Germany, creating an Allied High Commission to replace the Office of Military Government. Law No. 1 of the United States High Commissioner, effective January 1, 1950, replaced the courts known as Military Gov-

[1] The record is not entirely clear as to whether her confinement would not be justified, in any event, on the ground that she is presently insane (R. 15–20).

ernment courts with the United States courts of the Allied High Commission but the composition of these tribunals was not affected by the change in name, nor did it alter their criminal jurisdiction over dependents of members of the Allied forces. The courts of the Allied High Commission were at the time of petitioner's trial tribunals in the nature of military commissions conforming to the Constitution and laws of the United States. Accordingly, the tribunal which tried petitioner had jurisdiction to do so (R. 6–9).

The District Court discharged the Rule to Show Cause and dismissed the writ (R. 12, 34–36). Its order was affirmed by the Court of Appeals in a *per curiam* opinion (Pet. App. 1a).

ARGUMENT

Petitioner relies on the decision of this Court in *Reid* v. *Covert,* 354 U. S. 1, for the proposition that a Congressional grant of power to a court-martial to try American civilians in foreign countries is unconstitutional, and she deduces from this premise that, "If Congress could not constitutionally authorize the trial of civilian dependents for a capital offense overseas by courts-martial, it certainly could not constitutionally authorize the trial of civilian dependents for a capital offense overseas by a military commission, provost court, or other military tribunal" (Pet. 8).

These conclusions misconceive the import and the rationale of the *Covert* decision. It was there held that dependents of American servicemen cannot constitutionally be tried by court-martial when charged

with a capital offense in a country with which the United States is at peace. This conclusion does not help this petitioner, however, since in regard to the critical issue, that of the underlying political status of the American forces in Germany at the time of the offense and the trial, her situation was wholly unlike that present in the *Covert* case. Mrs. Madsen's trial took place at a time when the local government in Germany, while no longer a "Military Government," was "a government prescribed by an occupying power [which] depended upon the continuing military occupancy of the territory." *Madsen* v. *Kinsella,* 343 U. S. at 357. On the other hand, Mrs. Covert was tried in England and Mrs. Krueger Smith in Japan while the American forces were in those areas not by virtue of an occupation status arising out of the war but as friendly forces visiting pursuant to international agreement.[2] Because of this difference, the war powers of the Congress and the Executive, though not available in the latter situation, provide a firm legal basis for petitioner's trial by military court.[3]

In *Reid* v. *Covert,* Mr. Justice Black, in an opinion in which the Chief Justice, Mr. Justice Douglas, and

---

[2] See separate concurring opinion of Mr. Justice Frankfurter in *Covert*, 354 U. S. at 42. The Treaty of Peace with Japan was filed September 8, 1951, and entered into force and effect on April 28, 1952—some one year or six months respectively prior to the trial in the *Krueger* case. See *United States ex rel. Krueger* v. *Kinsella*, 137 F. Supp. 806, reversed, 354 U. S. 1; Proclamation, 66 Stat. C31–32. Of course, there was no recent war between the United States and Great Britain, the situs of the offense and trial in *Covert.*

[3] See Mr. Justice Black's opinion in *Reid* v. *Covert*, 354 U. S. at 34–35; cf. Mr. Justice Clark's dissent, 354 U. S. at 81–82.

Mr. Justice Brennan concurred, referred to and made clear this distinction when he stated (354 U. S. at 35, fn. 63):

> *Madsen* v. *Kinsella,* 343 U. S. 341, is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the Army or not.

Since petitioner relies solely upon the *Covert* decision as a basis for relief, the above-quoted language places her in the anomalous position of urging the Court to overrule its decision in her case on the basis of a subsequent opinion which confirmed both the effect and the rationale of that case.

Petitioner seeks to extricate herself from this dilemma by stating that the Court in *Covert* erred as to the true political status of the American forces in Germany, and the suggestion is made that an accurate picture with respect to this status has been revealed for the first time in connection with the present petition.

The fact is that petitioner's present point concerning the status of the American troops in Germany was presented in the same way when this case was before the Court in the previous *Madsen* case. On pp. 3–4 of the petition for writ of certiorari in *Kinsella* v. *Madsen,* No. 411, Oct. Term, 1951, petitioner pointed out, as here, that prior to her arrest and trial,

"military government and the military occupation of Germany, as such, had terminated" and that the German authorities had full legislative, executive and judicial powers, except only as limited by the Occupation Statute. Then, as now, the Government refuted petitioner's contention that military government and military law had ceased to function in Germany merely because new titles had been given to military government and to the military courts, and it asserted that, at the time of petitioner's offense and trial, the ultimate basis of authority in Germany was military conquest and continued military occupation.[4] That the Court recognized this situation is apparent from its statement, in answer to similar contentions as now advanced, that (343 U. S. at 360):

> It is suggested that, because the occupation statute took effect September 21, 1949, whereas the crime charged occurred October 20, 1949, the constitutional authority for petitioner's trial by military commission expired before the crime took place. Such is not the case. The authority for such commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit

[4] For example, it is stated in respondent's brief in *Kinzella* v. *Madsen*, No. 411, October Term, 1951, at p. 69: "* * * the nature of the governmental functions and tribunals of the United States in Germany is to be determined from the source of their authority. That source has been military conquest, followed by a military occupation which has continued to date." This brief also provided on pp. 4–11 a chronology, history, and description of the American governmental and judicial system in Germany.

the occupying power to discharge its responsibilities fully.

And in a footnote (fn. 27) it was noted, quoting Winthrop, *Military Law and Precedents* (2d ed. 1920) 801, that the status of military government continues until the invader is expelled or abandons his conquest, or until, by treaty of peace, the country is restored to its original allegiance or becomes incorporated with the domain of the prevailing belligerent.

It is obvious, therefore, that nothing significant has been adduced now that was not known to and considered by the Court when it decided *Madsen* v. *Kinsella* in 1952 and *Reid* v. *Covert* in 1957. The fact that Article III of the Constitution and the Fifth and Sixth Amendments are, for the first time, specifically relied upon is of no consequence since in *Covert* the Court, having studied the constitutional questions involved in the trial of civilians abroad, concluded that there is no impediment to military trials in conquered areas such as those here involved. And the allegations in the habeas corpus petition that a state of peace existed between the United States and Germany and that military government and the occupation of Germany, "as such," had ceased to exist in April, 1949, are equally uncontrolling. Petitioner concedes that "no formal Treaty of Peace had been signed" and that units of the United States military establishment were still in parts of Germany (Pet. 11–12); she conceded in the Court of Appeals that the German government was subject to certain powers reserved to the Allied High Commission (Brief, p. 8); and she conceded in the petition for

writ of certiorari filed in the previous *Madsen* case that the court which tried her was "an occupation court" (Pet. in *Madsen* v. *Kinsella,* No. 411, Oct. Term, 1951, p. 35).

Moreover, respondent's return and answer to the rule to show cause in the instant case contested certain of petitioner's assumptions by referring in refutation to statements made in opinions rendered in the previous *Madsen* case (R. 6-9), and the District Court apparently regarded these references as denials of the allegations (R. 33). Finally, petitioner's allegations with respect to the legal-political status of the American military forces in Germany can hardly be deemed controlling, in any event, in face of the fact that this Court on two previous occasions ruled to the contrary,[5] and in face of the fact that, as a matter of law, it is plain that a state of peace did not exist between the United States and Germany during the relevant period. 66 Stat. C3; 65 Stat. 451.

[5] That this Court was then in possession of all relevant information is revealed not only by the most cursory perusal of the briefs filed in the previous *Madsen* case and in *Covert*, but also by the appendix to the *Madsen* opinion which contains a chronology of the events leading to the establishment of American military courts and their jurisdiction (343 U. S. 362–371).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
W. WILSON WHITE,
Assistant Attorney General.
HAROLD H. GREENE,
Attorney.

MARCH 1958.